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No. 74-1542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and

JOHN C. DANFORTH, Attorney General of the
State of Missouri, and
MISSOURI AIR CONSERVATION COMMISSION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF FOR COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION AS AMICUS CURIAE

COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION
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MOTION OF COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Coalition for the Environment, St. Louis Region, respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. The consent of the attorneys for the respondent and the intervenor-respondents has been obtained. The attorneys for the petitioner have declined to consent, as they did in the Eighth Circuit.

1. The Coalition for the Environment, St. Louis Region (hereinafter Coalition) is a corporation organized and existing under the Illinois not-for-profit corporation laws, with its principal office in St. Louis County, Missouri. The Coalition is a membership organization, composed of approximately 30 affiliated member organizations and approximately 800 individual members, residing in both Missouri and Illinois. Its purposes include strengthening the efforts of its members in seeking to improve and preserve the air quality of the St. Louis Region. Through its member organizations, the Coalition represents the environmental concerns of thousands of people residing in the St. Louis region.

2. The Coalition has a direct, and active, interest in this litigation. For the last six years the Coalition has actively taken part in various hearings and meetings concerning problems of air pollution control in the St. Louis Region. The Coalition regularly attends meetings of intervenor-respondent Air Conservation Commission of Missouri, and testifies at public hearings of that agency relating to air pollution control in the St. Louis region. At the statutory hearing conducted by the Missouri Air Conservation Commission on the adoption of the implementation plan which is the subject of the petition for review in this case, on January 5, 1972, the Coalition testified in support of the public interest, and promised to assume the role of community monitor of enforcement of the plan (Tr. 69-72). The Coalition filed a brief amicus curiae, and participated in the oral argument, in the court below; the Coalition's brief presented an analysis of the issues different from that presented in any of the other briefs, and the Coalition's analysis ultimately formed the principal basis of the opinion of the court below. The matters which petitioner is attempting to raise in this proceeding are matters of great public interest and of great concern to the Coalition and to those members of the public who are associated with the Coalition in a voluntary capacity to defend the public interest in clean air in the St. Louis region.

3. Not having seen the briefs for the respondent or the intervenor-respondents, the Coalition cannot state with certainty that the facts and questions of law presented in the accompanying brief will not be adequately presented by the parties. The Coalition doubts that they will be, for two reasons: First, experience in the court below indicates that respondent and intervenors are likely to approach the case, and analyze the issues, in a manner different from that of the Coalition. Second, experience generally, and the Clean Air Amendments of 1970 themselves, indicate that the voice of the public should be heard at every stage of proceedings under the Clean Air Act, in addition to the voices of industry and the governmental agencies, because the governmental agencies cannot be expected to view the issues in the same light as the public.

4. Specifically, Congress has emphatically expressed its concern in recent years that organizations like the Coalition, representing the public, be heard at all appropriate stages of proceedings to control air and water pollution. Congress has repeatedly recognized that the perspective, and the views, of a public-interest organization such as the Coalition will often vary from, and sometimes conflict with, the perspective and the views of the governmental agencies charged with administering the legislative program. In the Clean Air Amendments of 1970, the Water Pollution Control Act of 1972, and other recent legislation, Congress has exhibited a healthy skepticism of the administrative agency as the sole guardian of the public interest. See authorities cited in Part III of the accompanying brief.

5. The Coalition is represented in this case by counsel experienced in matters of air pollution control. He served as the first chairman of the Missouri Air Conservation Commission from 1965 to 1969, and has remained active in the field of air pollution control since that time. The Coalition believes that its brief will aid the court in understanding the issues, and the public's view of the issues.

Wherefore, movant prays that this Court grant movant leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted

COALITION FOR THE ENVIRONMENT,
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BRIEF FOR THE COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Coalition for the Environment, St. Louis Region (hereinafter Coalition), as amicus curiae, submits this brief in sup-

port of the decision below, together with a motion for leave to file this brief. The interest of the Coalition is set forth in detail in the motion.

STATUTES INVOLVED

Section 307(b)(1) of the Air Quality Act of 1970 is set forth at page 2 of petitioner's brief. Sections 110(a)(2) and 116 of the Act, 42 U.S.C. 1857c-5(a)(2) and 1857d-1, are equally involved in this proceeding. The former is set forth in the appendix of this brief, and the latter is quoted at p. 10, *infra*.

ARGUMENT

I. The Clean Air Act, as Amended, Does Not Authorize or Require EPA to Disapprove Missouri's Sulfur Dioxide Emission Regulation Simply Because It Is More Stringent Than Necessary to Attain Federal Ambient Air Quality Standards (if, Indeed, It Is).

A. The statutory framework

The petition for review was filed in the court of appeals under Section 307(b)(1) of the Clean Air Act, as amended, 42 U.S.C. 1857h-5(b)(1). It is a petition for review of the Administrator's action in approving a Missouri "implementation plan," a plan to achieve the desired goal of clean air.

Thus, the action which the court of appeals is empowered by Section 307(b)(1) to review is the action taken by the Administrator under Section 110 of the Act, 42 U.S.C. 1857c-5 (a)(2), in approving the Missouri plan. That section (set forth in the Appendix, *infra*) provides that "The Administrator *shall* approve such plan" if he determines certain specified facts. Those facts may be imprecisely, but sufficiently for present purposes, summarized as follows:

1. The plan can be expected to attain federal primary air quality standards as expeditiously as practicable, and federal secondary standards reasonably quickly;

2. The plan includes emission limitations and time tables sufficiently stringent to insure that these goals will be achieved;

3. The plan provides for appropriate monitoring procedures;

4. The plan provides for appropriate review of location of new major sources;

5. The plan provides for intergovernmental cooperation;

6. The plan provides assurances of necessary funding, requirements of monitoring devices, periodic reports, and emergency contingency authority;

7. The plan provides for inspection and testing of motor vehicles;

8. The plan provides for revision to make it more stringent, if such revision should become necessary; and

9. The plan was adopted by Missouri after reasonable notice and public hearings.

> "[P]lainly . . . [the Administrator] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 100(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC*, 421 U.S. 60, 79 (1975) (emphasis in original).

To set aside the Administrator's approval of the plan, on a petition for review, the court of appeals presumably must find that his approval was arbitrary and capricious. See, *e.g.*, *Friends of the Earth v. EPA*, 499 F. 2d 1118, 1123 (2d Cir. 1974); *Natural Resources Defense Council v. EPA*, 478 F. 2d 875, 881 n.6 (1st Cir. 1973). However, the standard of review is of less significance at this point in the proceedings than the scope of the review. At the very least, the court of appeals would have to find that the Administrator's approval was incorrect, because his determination of one or more of the above factors was erroneous.

Accordingly, in order to state a claim under 42 U.S.C. 1857 h-5(b)(1), on grounds arising more than 30 days after the Administrator approved the plan, the petition for review apparently must allege matters which, if they had been in existence and had been known to the Administrator at the time he approved the plan, would have prevented him from determining one of the above factors. These are the kinds of matters considered by the courts in such cases as *Natural Resources Defense Council v. EPA*, 483 F. 2d 690 (8th Cir. 1973); *Natural Resources Defense Council v. EPA*, 478 F. 2d 875 (1st Cir. 1973). The jurisdiction of the court of appeals, in this narrow statutory proceeding, is limited to a claim of matters which would have prevented the Administrator from determining one or more of those factors, or a claim of violation of some other statute, such as the Administrative Procedure Act or the National Environmental Policy Act. This is, after all, as the court below pointed out (515 F. 2d at 212), a petition for review, not an original proceeding in the federal court of appeals.

B. **This petition for review presents no issue cognizable in this statutory proceeding**

In paragraphs 20 through 26 of its petition for review (App. 6-8, 13-14), Union Electric purports to set forth its grounds

for its petition. In general summary, Union Electric is alleging matters relating to its own individual problems respecting technical and economic feasibility of compliance with Missouri's emission limitations, and is urging that Missouri's emission limitations are more stringent and more expensive than are needed to achieve the federal air quality goals. (Petitioner also alleges that some regulatory commissions would not approve the expenditures needed for compliance (Petition Para. 24, App. 7); that allegation is not only irrelevant, but is entirely hypothetical, and not ripe for presention in any proceeding in which it might be relevant.)

None of the grounds asserted by petitioner is relevant in any way to the factors to be determined by the Administrator under 42 U.S.C. 1857c-5(a)(2). Even if the points alleged were true, and had been true at the time of the Administrator's approval, and had been brought to his attention, none of them would even justify, much less require, disapproval of Missouri's implementation plan.

In some circumstances, a claim of economic or technical infeasibility would be relevant to the Administrator's determination of the question whether the state plan "provides for the timely attainment . . . of ambient air standards." *Train v. NRDC*, 421 U.S. at 79. For example, when a state specifically regulates the *means* or *methods* by which emissions are to be reduced, rather than adopting regulations in terms of *performance*, economic and technical feasibility become relevant factors. This distinction can be illustrated by the following examples.

In *Getty Oil Co. v. Ruckelshaus*, 467 F. 2d 349, 353 (3d Cir. 1972), the Delaware Water and Air Resources Commission apparently had adopted a regulation limiting the sulfur content of fuel used with specified equipment in specified locations. The regulation apparently did not, like Missouri's Regulation X, give the industry the choice of means to limit emissions, but prescribed the specific means to be used: low-sulfur fuel. In determining whether the Delaware scheme would provide for the timely attainment of ambient air standards, the Administrator would have to consider (at least if the question is raised) such questions of technical feasibility as whether the low-sulfur fuel is available, and whether it could be burned in the specified equipment without clogging or damaging the equipment, and similar technical questions. If the fuel simply wouldn't function properly, then Delaware would have to permit the use of alternative means to reduce emissions, or adopt more stringent regulations for other sources, in order to attain the ambient air standards.

Or consider the New York scheme to control carbon monoxide and other pollutants emitted by automobiles, at issue in *Friends of the Earth v. EPA*, 499 F. 2d 1118, 1121 (2d Cir. 1974). Among other things, New York required retrofitting of light-duty vehicles with catalytic converters. In determining whether such retrofitting would reduce emissions as much as was predicted, and whether the New York plan would thereby provide for the timely attainment of ambient air standards, the Administrator would have to consider whether the technology has in fact attained the degree of effectiveness ascribed to it. If not, New York would have to make other provisions to attain the prescribed goal.

Alternatively, let us assume that Delaware, instead of limiting the sulfur content of fuel, had required installation of sulfur removal processes on power plant stacks. In determining whether such a regulation would provide for the timely attainment of ambient air standards, the Administrator would have to consider whether the technology has attained a degree of effectiveness which would bring about the needed reduction (if any) of emissions; technological feasibility would be the primary issue before the Administrator. If he determined that the sulfur removal processes would not be sufficiently effective, he would be

required to disapprove the plan (not the regulation), because the plan will not achieve the desired goals. "If he finds [the plan] reasonably unlikely to achieve such results within the fixed time-tables, whether for technological or economic reasons, or otherwise, he should reject the plan and return it to the state authorities with instructions to consider alternative procedures that might meet the statutory requirements as established by the Administrator." *Appalachian Power Co. v. EPA*, 477 F. 2d 495, 506 (4th Cir. 1973).[1]

Missouri, however, has been careful to draw up its regulations in terms of *performance*, leaving the industrial sources free to use whatever means they think best to achieve the required reduction (if any) of emissions. Regulation X, effective March 24, 1967, provides that no person may cause the emission of sulfur dioxide from a large power plant "in an amount greater than 2.3 pounds of sulfur dioxide per million" BTU. The utilities are free to choose any method they desire to achieve that maximum: change to low-sulfur coal, low-sulfur oil, natural gas, nuclear or other sources of power, or clean the coal before combustion, or add reagents in the combustion process, or remove the sulfur dioxide from the gas flow after combustion, or anything else.

Thus, it cannot rationally be argued that, because of economic or technological difficulties, Missouri should have devised some

[1] Note that a determination by the Administrator that the technology of sulfur dioxide removal processes is not yet proved would not simply lead to a disapproval of the specific requirement, and an approval of the remainder of the plan, which is what the petition for review seeks (App. 8). On the contrary, the entire plan (at least insofar as it was directed toward sulfur dioxide) would be disapproved. Delaware would be required to develop another plan to reduce the ambient air concentrations of sulfur dioxide—for example, more stringent controls on other sources of sulfur dioxide. Having done so, Delaware could still require the installation of sulfur dioxide removal processes on large power plants, notwithstanding the Administrator's skepticism as to their effectiveness. The situation would be analogous to that posited by the Appalachian *amicus curiae*, at p. 17 of their brief.

alternative regulation for large power plants, to provide for the timely attainment of ambient air standards. And petitioner is not presenting any such argument. On the contrary, petitioner alleges that its individual compliance with Missouri's regulations is not necessary to achieve the federal goals; in short, that Missouri's regulations are more stringent than federal law requires. That is apparent from the petition for review (para. 26, App. 13-14), and a reading of petitioner's brief. At the oral argument before the court of appeals, this was candidly[2] conceded by petitioner's counsel:

> The Court: "Yes, in some kinds of cases, but that relates back to 1857c-5, which appears to indicate that the Administrator is required to approve plans if he determines certain things. Here, as I understand it, you're not contending that the plan doesn't contain these things, what you're saying is the requirements are too strict and too severe.
>
> Mr. Ferrell: That is true, your Honor." (Tape recording of oral argument, in custody of Clerk, Eighth Circuit Court of Appeals, St. Louis, Mo.)

[2] Petitioner's supporting *amici* have obfuscated the issue considerably. Thus Edison Electric Institute blithely restates the Question Presented (p. 2):

> ". . . whether—*under any circumstances*—technological and economic factors are relevant to the Administrator's approval of a state implementation plan . . ." (italics in original).

The Coalition trusts that this Court need not be reminded that the issue is whether, *under the circumstances of this case, on this record, this petition for review* alleges any facts which would have caused the Administrator to disapprove Missouri's Regulation X.

The other *amici* have obfuscated in a more sophisticated manner, but all have set up the same straw man, and knocked it down. All have pointed out that in some situations questions of economic and technological feasibility are relevant to the Administrator's determination. Of course that is correct, when the considerations suggested will tend to show that the state implementation plan will not provide for the timely attainment of air quality standards. But it is

Assuming, arguendo, that petitioner is correct in stating that Missouri's regulations are more stringent than required to meet the federal ambient air standards, that fact would not justify disapproval of the plan by the Administrator. If the Administrator determines that Missouri's plan is sufficiently stringent to meet the minimal federal goals, he "*shall* approve such plan," whether or not it is more stringent than federal law requires. In Section 116 of the 1970 Act, 42 U.S.C. § 1857d-1, Congress expressly provided:

> "Except as otherwise provided in sections 1857c-10(c), (e), and (f), 1857f-6a, 1857f-6c(c)(4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or

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not correct, when the considerations will *not* tend to show that, as in this case. The amici have ignored the difference between performance regulations and means regulations.

All three *amicus* briefs (unlike petitioner's brief) have also ignored the record in other respects. All three argue that the economic and technological evidence (supposedly showing that petitioner cannot or will not comply with Regulation X) is relevant when the Administrator determines whether the ambient air quality standards will be attained within the time prescribed by Congress (Appalachian brief 14, 17; Edison brief 2-3; Pacific Legal Foundation brief 13). But the amended petition for review alleges (and it has not been denied) that those standards will be attained in good time even if petitioner does not comply with Missouri's Regulation X (App. 13-14). Taking the allegation as true, on this record, the straw man collapses before the *amici* can even knock it down. In elucidating a new and complex statute, regulating conduct which has complex physiological, as well as economic and technological, aspects, the courts should proceed with care. It is sufficient to decide the case presented by this record, without trying to decide other cases.

> section 1857c-7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

As Union Electric's vice-president, Earl K. Dille, correctly assured the Missouri Air Conservation Commission at the statutory public hearing on adoption of this implementation plan, on January 5, 1972: "If the people of this metropolitan area want to spend a quarter of a billion dollars to reduce anticipated ground-level SO_2 concentrations in the vicinity of Labadie from .0024 parts per million to .0004 parts per million, it is their decision to make." (Transcript, page 56). Thus, petitioner's claim is wholly outside the purview of the federal legislation, and outside the scope of review of the court of appeals.

C. The congressional purpose to place primary responsibility for air pollution control in the states should be fulfilled

The Air Quality Act of 1967, the Clean Air Amendments of 1970, and the partially parallel bill, the Water Pollution Control Act of 1972, were extraordinarily innovative efforts in two fundamental respects:

1. As indicated in Part III of this brief, they reflected a deep and growing mistrust of governmental administrative agencies as guardians of the welfare of the people, and provided detailed procedures by which private citizens can take an active part in the enforcement of these laws; and

2. In an effort to uphold the federal interest in clean air and clean water, while arresting the flow of authority and responsibility to the federal government, they devised a new and "elaborate form of cooperative federalism." *Brown v. EPA*, 521 F. 2d 827, 835 (9th Cir. 1975). Congress felt compelled to as-

sure that a minimum level of cleanliness would be achieved in our ambient air, and our national waters. But Congress "explicitly preserved the principle: 'Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .'" *Train v. NRDC*, 421 U.S. 60, 64 (1975). To that end, Congress "left to the States considerable latitude in determining how the [ambient air quality] standards would be met." 421 U.S. at 87.

The intermeshing of federal and state regulatory agencies is a novel one. It will be extremely difficult to administer. No doubt it will need much tinkering and many modifications. But it is a real, and serious, effort, doubtless arising in substantial measure from Senator Muskie's years of work with, and oversight hearings on, the 1963 and 1967 Clean Air Acts, and his years of active interest in the Advisory Commission on Intergovernmental Relations. This effort to develop a new form of cooperative federalism should be hospitably received in this Court.

The result advocated by petitioner, and by supporting *amici curiae*, would snuff out this first faint flicker of hope of restoring to the states a responsible role in regulatory matters of national concern. If petitioner's plaints must be heard on this petition for review (and if we assume they can be proved true), then the result must be that the federal Administrator must *disapprove* the Missouri Regulation X. 42 U.S.C. § 1857c-5 (a)(2). Unless Missouri manages to replace Regulation X with some other regulation, satisfactory to the Administrator, the Administrator must then promulgate his own alternative regulation, which has the force of law. 42 U.S.C. § 1857c-5(c). Under the Supremacy Clause, it seems clear that the disapproved Missouri Regulation would no longer be effective.[3]

[3] We do not understand petitioner to argue otherwise; indeed, it is the essence of petitioner's case that petitioner seeks to be relieved of the strictures of Regulation X. The suggestion in the *amicus* brief of Appalachian Power Co., et al. (page 37) that Missouri can have one set of emission limitations which are a part of the implementation plan, and simultaneously a second (different, more stringent) set which "would be *outside* of the implementation plan," is without merit. Even if we ignore the Administrator's "disapproval," and the United States Constitution, such a dual set of emission limitations boggles the mind. Which set would a specific company comply with? Can it be seriously supposed that Congress intended the state to promulgate one set of emission limitations, for the purpose of showing it to the Administrator to gain federal approval of the implementation plan, and at the same time to maintain in the background a different set of emission limitations, which the state really intends to enforce? If the Administrator happened to learn about the second set, would he not be concerned about them? Would he not be compelled to concern himself with them, in order to predict what is likely to happen to the ambient air in that state, in order to determine whether the state will really attain the desired goals in the specified time?

The legislative history set forth at pages 36-37 of the *amicus* brief does not indicate that Congress intended any such dual set of limita-

Thus, the federal administrator would be denying the states the right to enforce their desired emission limitations, contrary to the express guaranty of § 1857d-1, simply because, for example, he concludes that compliance would be unduly expensive for the complaining industry.

While Congress sought to preserve for the states the maximum flexibility, this Court, in reversing, would be putting a straitjacket on the states, requiring conformance to exactly that specific regulation deemed best by the Administrator.

Accordingly, the court below properly dismissed the petition for review.

II. Petitioner Has Not Exhausted the Available Administrative Remedies.

Petitioner has co-existed peacefully (more or less) with Missouri's Regulation X since March 24, 1967, by invoking the

variance procedure. The Missouri statute expressly authorized the granting of a "variance" under the circumstances alleged by petitioner:

> "The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance." § 203.110(1), R.S. Mo.

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tions. On the contrary, the term "implementation plan" was well established before the 1970 Act. The Air Quality Act of 1967, P.L. 90-148, 81 Stat. 485, called for "plans for implementation" of air quality standards in §§ 106(a), 108(c)(1). In Guidelines for the Development of Air Quality Standards and Implementation Plans, published in May, 1969, by EPA's predecessor in air pollution control, the Department of Health, Education and Welfare, the term is defined (Section 1.52):

> "An implementation plan is a blueprint of the steps that will be taken to insure attainment of an air quality standard within a reasonable time. It includes *all* the steps to be taken to abate and control pollutant emissions from existing sources in an air quality control region and to prevent urban and economic growth from adding to a region's air pollution problems." (Emphasis added.)

Appalachian Power Co. is accustomed to keeping two (or more) sets of accounts, but Missouri cannot have two divergent sets of emission limitations existing side by side.

Time and again, petitioner has renewed its variances. Indeed, another application for renewal was pending, when this petition for review was filed, before the Missouri Air Conservation Commission (and one before the St. Louis County Air Pollution Control Appeal Board) (App. 5). Since petitioner maintains that its emissions do not have the effect of continuing a "health hazard," nothing appears to stand in the way of further renewal.

Why, then, was this petition filed in 1974, after seven years of peaceful co-existence? Apparently petitioner looked apprehensively at the approaching date of May 31, 1975; for periods after that date, the Eighth Circuit (like the First, Second, and Fifth) had shot down the variance procedure, as noted by this Court in *Train v. NRDC, supra*. This foreboding generated the spectre of gloom and doom which haunts the petition for review, and which was trotted out before the court of appeals. That spectre, of course, has been banished by the decision in *Train v. NRDC*, 421 U.S. 60 (1975). But petitioner plunges on, and "turns no more [its] head." To play out the remainder of this litigation before this Court now, after *Train v. NRDC* resuscitated the variance procedure in the Eighth Circuit, is like playing out *The Rime of the Ancient Mariner* without the albatross.

There is no reason to suppose that petitioner and the Missouri Air Conservation Commission cannot continue to find an accommodation satisfactory to them and to the Environmental Protection Agency. And even if that accommodation could not be achieved, there is no basis for an assumption that the Administrator would bring an enforcement action against petitioner; the decision to bring an enforcement proceeding, unlike the notice of violation, lies in the discretion of the Administrator. *E.g., West Penn Power Co. v. Train*, 522 F. 2d 302, 310 (3d Cir. 1975). Petitioner's plaints are exceedingly prematur[e].

Petitioner's brief relies heavily on the 1973 decision of the Sixth Circuit in *Buckeye Power, Inc. v. EPA*, 481 F. 2d 162

(6th Cir. 1973). More timely is the decision of the Sixth Circuit in *Buckeye II*, October 24, 1975, 8 ERC 1317, after this Court's decision in *Train v. NRDC, supra*. Buckeye, like petitioner, asked the court of appeals to set aside the Administrator's approval of a state implementation plan on the ground that compliance was economically and technically infeasible. The Sixth Circuit ruled:

> "Our conclusion is that the disputes which petitioners seek to have this court resolve are being worked out at the state agency level where the EPA statute, as construed by the Supreme Court, clearly contemplates they should be . . . Since the record now before us demonstrates that these processes of adjustment are presently proceeding exactly as, and where, the statute contemplated, and that no final resolution as to them has been arrived at, this case is not presently ripe for judicial review." 8 ERC at 1319, 1320.

The variance procedure is not the only remedy available. The 1970 Act, at 42 U.S.C. Section 1857c-5(f), provides another procedure to deal with the circumstances alleged by Union Electric: that the necessary technology is not available, that interim control measures have reduced the impact of Union Electric's plants on public health, and that the continued operation of Union Electric's plants is essential to the public health or welfare. Under those circumstances, the Governor of Missouri may apply to the Administrator to postpone the applicability of the requirements of the plan, as to Union Electric's plants. If those circumstances really exist, then the Administrator must grant a postponement. One cannot assume that the Governor (if he takes these allegations seriously) would be totally insensitive to the predicted "national catastrophe," and would refuse to make such an application.

Other remedies may also be available. Perhaps Union Electric's arguments could be advanced as a defense in an enforce-

ment proceeding brought by the Administrator, as indicated in *Buckeye I*, 481 F. 2d 162, 173 (6th Cir. 1973). If the Missouri regulations are as unreasonable as Union Electric would have them appear to be, perhaps Union Electric can bring a suit in a court of *nisi prius* jurisdiction to have them set aside as violating the Fourteenth Amendment. But the administrative review, in this narrow statutory proceeding, is limited to the factors listed in the statute as a basis for the approval of the plan by the Administrator, and the Administrator's compliance with other statutes. The court of appeals has not been instructed by congress to investigate and remedy all wrongs, real or fancied, of which petitioner might complain.

III. The Right of the Public, and Particularly This Amicus Curiae, to Participate in Any Further Proceedings Should Be Carefully Preserved.

If, somehow, this Court should reverse, and order some further proceedings, the Coalition respectfully urges that this Court, in writing an opinion, take especial care to guard the rights of public participation which Congress sought to guarantee, in the Clean Air Amendments of 1970.

In that Act Congress has clearly expressed its belief that public participation in the establishment and the revision of air quality standards is essential. The 1970 Act "embraced the concept of 'citizen enforcement' of antipollution laws." *Natural Resources Defense Council v. EPA*, 489 F. 2d 390, 397 (5th Cir. 1974). See also *Natural Resources Defense Council v. EPA*, 484 F. 2d 1331, 1334 (1st Cir. 1973). The Act requires that states hold public hearings in both the promulgation and the revision of implementation plans (§ 110(a)(1) and (3), 42 U.S.C. § 1857c-5(a)(1) and (3)), that the Administrator provide opportunity for hearings on a Governor's application for postponement (§ 110(f)(2)(A), 42 U.S.C. § 1857c-5(f)(2)(A)), and

that any interested person may seek judicial review of such a postponement (§ 110(f)(2)(B), 42 U.S.C. § 1857c-5(f)(2)(B)). Furthermore, the Act provides for citizen suits (§ 304, 42 U.S.C. § 1857h-2) and the courts have allowed public interest groups to bring a petition to review the Administrator's approval of a state implementation plan under § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1). *E.g., Natural Resources Defense Council v. EPA*, 483 F. 2d 690 (8th Cir. 1973); *Friends of the Earth v. EPA*, 499 F. 2d 1118 (2d Cir. 1974).

Further references to public participation may be found in the following sections of the Clean Air Act: §§ 103(e), 109(a)(1)(B), 110(a)(3), 111(b)(1)(B), 112(b)(1)(B), 114(c), 115(d)(1), 115(f)(1), 117(a)(1), 42 U.S.C. §§ 1857b(e), 1857c-4(a)(1)(B), 1857c-5(a)(3), 1857c-6(b)(1)(B), 1857c-7(b)(1)(B), 1857c-9(c), 1857d(d)(1), 1857d(f)(1), 1857e(a)(1). As the Senate Committee reported, "The committee also was concerned that public participation, a unique feature of the Air Quality Act of 1967, should be preserved." S. Rep. 91-1196, 91st Cong., 2d Sess. page 2 (Sept. 17, 1970).

The Court's disposition of this matter will have precedential effect with respect to the federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.* which closely parallels the Clean Air Act in many respects. The Water Pollution Act states in its "Declaration of Goals and Policy" that public participation "shall be provided for, encouraged and assisted." § 101(e), 33 U.S.C. § 1251(e). Section 509(b)(1) of that Act, 33 U.S.C. § 1369(b)(1), provides for judicial review of the Administrator's actions in terms similar to those found in § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1).

It is relevant, also, that Missouri has recognized the value of public participation in the administration of its Air Conservation Law, Mo. Rev. Stat. § 203.010 *et seq.* The Missouri Air

Conservation Commission, the agency whose regulations are here challenged, is required to have among its members representatives of the general public (§ 203.040(1)) and must hold public hearings prior to the adoption, amendment or repeal of any standard, rule or regulation (§ 203.070(1)).

Thus, this Court is urged to insure that the state and federal agencies, and the lower courts, implement the salutary public policy, expressed by both the Congress and the Missouri General Assembly, that the public participate in any decision-making process concerning the environment. If any further proceedings (other than affirmance) ensue, the principle of public participation in the decision-making process, in cases directly involving the quality of the air we breathe, should be zealously protected by this Court, in keeping with the spirit of the federal and state legislation respecting air pollution control.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted

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APPENDIX

APPENDIX

Section 110(a)(2), Clean Air Act as Amended, 42 U.S.C. § 1857c-5(a)(2)

The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modifi-

cation) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.